RECORD AND BRIEFS

17-459

FILED
SEP 27 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.

IN THE

Supreme Court of the United States

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 27, 2017

QUESTION PRESENTED

The Attorney General can cancel removal of certain immigrants under 8 U.S.C. § 1229b(a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence. *Id.* § 1229b(a)(2), (b)(1)(A). Under the "stop-time rule," those periods end when the government serves a "notice to appear under section 1229(a) of this title." *Id.* § 1229b(d)(1). Section 1229(a) defines a "notice to appear" as "written notice . . . specifying" certain information, including "[t]he time and place at which the proceedings will be held." *Id.* § 1229(a)(1).

The First Circuit held, disagreeing with the Third Circuit but agreeing with the Board of Immigration Appeals and other circuits, that the stop-time rule is triggered when the government serves a document that is labeled "notice to appear" but that lacks the "time and place" information required by the definition of a qualifying "notice to appear."

The question presented is:

Whether, to trigger the stop-time rule by serving a "notice to appear," the government must "specify" the items listed in the definition of a "notice to appear," including "[t]he time and place at which the proceedings will be held."

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wescley Fonseca Pereira respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-16a) is reported at 866 F.3d 1. The decision of the Board of Immigration Appeals (Pet. App. 17a-19a) is unreported. The decision of the immigration judge (Pet. App. 20a-25a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)(1) provides in relevant part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> > (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application * * * * .

8 U.S.C. § 1229b(d)(1) provides in relevant part:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end * * * when the alien is served a notice to appear under section 1229(a) of this title.

8 U.S.C. § 1229(a)(1) provides in relevant part:

> In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:
>
> * * * *
>
> (G)(i) The time and place at which the proceedings will be held.

The full text of Sections 1229 and 1229b is reprinted in the Appendix, *infra*, at 26a-43a.

INTRODUCTION

This case concerns an acknowledged circuit conflict concerning the immigration "stop-time rule." That rule can render an immigrant ineligible for cancellation of removal, an important form of relief open to the most deserving applicants. If the petitioner had appeared in a different immigration court in a circuit on the other side of the conflict, he might well be allowed to stay in the United States with his wife and two young, U.S.-citizen children.

To be eligible for cancellation, an immigrant must establish a specified period of continuous residence

in the United States. Under the stop-time rule, that period of continuous residence ends upon service of a "notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). Section 1229(a) defines a "notice to appear" as a document that specifies particular information, including the time at which the immigrant must appear for a removal hearing.

The entrenched circuit conflict concerns whether the government can still stop the clock if it omits the statutorily required information about the removal hearing. The court below and five other circuits have held, deferring to the Board of Immigration Appeals ("BIA"), that the Department of Homeland Security ("DHS") triggers the stop-time rule when it serves a document labeled a "notice to appear," even if the document does not state when the immigrant must appear, as required by § 1229(a)'s "notice to appear" definition. The Third Circuit, however, has rejected these decisions, concluding that under the statute's plain text, service of a written notice that does not include the information specified in § 1229(a)'s "notice to appear" definition is not service of a "notice to appear under § 1229(a)," and does not trigger the stop-time rule.

The conflict is entrenched, and the issue recurs frequently. The Third Circuit's decision explicitly addressed, and disagreed with, five of the other courts of appeals, and the First Circuit's decision in this case explicitly addressed, and disagreed with, the Third Circuit's decision. All seven of those published decisions have come in the last three years alone, and the same issue has been the subject of numerous unpublished decisions. When the question presented arises, it is often, as in this case, disposi-

tive of an immigrant's eligibility for cancellation of removal.

The circuit conflict is particularly pernicious given that the BIA's position is plainly incorrect. The statute triggers the stop-time rule only on service of a "notice to appear under section 1229(a)," and § 1229(a) defines a "notice to appear" as a document that includes specific information, including the time of the removal hearing. Under the statute's plain terms, a document that *lacks* this information is not a "notice to appear under § 1229(a)," and service of such a document does not trigger the stop-time rule.

The court below, following the BIA, relied heavily on the "administrative context" to support the contrary reading. But a desire to make life easier for DHS cannot overcome the statute's unambiguous text. Further, the administrative context that the BIA sought to accommodate—a DHS regulation authorizing a two-step notice-to-appear process—actually undermines, not supports, the BIA's interpretation of the stop-time rule.

The question presented can cut off eligibility for an important form of relief even in the most deserving instances, as this case demonstrates. Petitioner Wescley Pereira is the father of, and primary breadwinner for, two young, U.S.-citizen children. He is a respected member of the community in Martha's Vineyard, where he has lived for more than a decade. This Court should grant certiorari to ensure that whether people like Mr. Pereira are eligible for cancellation of removal does not turn on the happenstance of where they are brought into immigration court.

STATEMENT

A. Cancellation Of Removal Is An Important Discretionary Form Of Relief Available To The Most Deserving Immigrants.

For more than a century, the immigration laws have given the Attorney General (or another official) discretion to allow deserving immigrants with U.S. family connections to remain as lawful permanent residents, even if they were otherwise inadmissible or removable. *See, e.g.*, Immigration Act of 1917, § 3, proviso 7, ch. 29, 39 Stat. 874, 878. As one Congressional report explained, such provisions are intended to protect "aliens of long residence and family ties in the United States," whose removal "would result in a serious economic detriment to the[ir] family." S. Rep. No. 81-1515, at 600 (1950).

The current statute gives the Attorney General the power to grant "cancellation of removal," and a green card, to eligible non-permanent residents when their removal would cause "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a United States citizen or lawful permanent resident. 8 U.S.C. § 1229b(b). This discretionary relief is only available to those with "good moral character" who have not been convicted of specified criminal offenses. *Id.* The Attorney General can also cancel removal for permanent residents who have not been convicted of an aggravated felony when the equities favor allowing them to remain in the country. *Id.* § 1229b(a); *Matter of Sotelo-Sotelo*, 23 I. & N. Dec. 201, 203 (BIA 2001). Cancellation is one of the most important tools for keeping immigrant families united and allowing immigrants who have made positive

contributions to their communities to remain in the country.

To be eligible, an applicant for cancellation of removal as a non-permanent resident must have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the" cancellation application. 8 U.S.C. § 1229b(b)(1). If the applicant is a lawful permanent resident, the required period is 7 years of continuous residence. *Id.* § 1229b(a)(2).[1]

B. The Period Of Residence Necessary For Cancellation Of Removal Is Deemed To End Upon Service Of A "Notice To Appear," Which The Statute Defines As Written Notice Specifying Particular Information.

The stop-time rule at issue in this case was adopted to address a very specific problem with earlier forms of discretionary relief. Before 1996, when eligibility for relief turned on a specified period of U.S. residence, that period continued to run during the pendency of removal proceedings. *See Matter of Cisneros-Gonzalez*, 23 I. & N. Dec. 668, 671 (BIA 2004). Congress grew concerned that immigrants had an incentive to obstruct and slow removal proceedings in order to satisfy the residence requirement. *Id.*

In response, Congress enacted the "stop-time" rule. Under this rule, "any period of continuous residence or continuous physical presence in the United States

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[1] For simplicity, the term "continuous residence" is at times used in this petition to encompass both durational requirements.

shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title." 8 U.S.C. § 1229b(d)(1). In other words, Congress specified that the stop-time rule is triggered by service of a specific document: "a notice to appear under section 1229(a)."

Section 1229(a), in turn, provides that the document "in this section referred to as a 'notice to appear'" is "written notice . . . specifying" particular information. 8 U.S.C. § 1229(a)(1). Included on that list are the key pieces of information an immigrant needs in order to "appear" at a hearing—information like the "acts or conduct alleged to be in violation of law"; the "charges against the alien and the statutory provisions alleged to have been violated"; the fact that the "alien may be represented by counsel"; the "time and place at which the proceedings will be held"; and the "consequences . . . of failure . . . to appear at such proceedings." *Id.*

B. The Board Of Immigration Appeals Concludes That A Notice Triggers The Stop-Time Rule Even If It Does Not Include The Time Of Proceedings, As Required By The Definition Of A "Notice To Appear."

Two courts of appeals initially interpreted the stop-time rule to apply only once an immigrant receives written notice of *all* the information listed in the statute's definition of a notice to appear. *Guamanrrigra v. Holder*, 670 F.3d 404, 410-11 (2d Cir. 2012); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005). But the BIA disagreed with those

decisions and adopted the opposite interpretation. *Matter of Camarillo*, 25 I. & N. Dec. 644 (BIA 2011).

DHS had served Camarillo, a lawful permanent resident, with a document that DHS had labeled as a notice to appear, but that did not state the date or time of any hearing. *Id.* at 644. More than two years later, after she had maintained sufficient U.S. residence to qualify for cancellation (seven years), Camarillo received a hearing notice. *Id.* Camarillo applied for cancellation of removal, and the Immigration Judge ("IJ") granted her application. *Id.* The IJ concluded that Camarillo was eligible because her period of continuous residence continued until she received written notice of all of the information required in a "notice to appear," which did not occur until she was informed of the date and time for her appearance. *Id.*

The BIA reversed, concluding that Camarillo stopped accruing residence when DHS served its initial notice, even though that document did not include the statutorily-required time of her hearing. *Id.* The BIA held that while the IJ's reading of the statute was "plausible," an "equally plausible" reading was that the reference to a "notice to appear under section [1229](a)" is "simply definitional." *Id.* at 647. According to the BIA, under this "definitional" reading, the statutory phrase merely "specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule," but does not impose *any* "substantive requirements" as to what must be in that document to end the period of continuous residence. *Id.*

Having found the statutory language "ambiguous," the BIA concluded that the "best reading" of the

statute is its "definitional" one. *Id.* The BIA concluded that the "key phrase" is "served a notice to appear," and that the words "under section [1229](a)" merely "specify the document the DHS must serve." *Id.* This reading, according to the BIA, was consistent with regulations stating that the date and time of an initial hearing should only be included in the notice to appear "where practicable"; if that information is left out, then the Immigration Court must schedule and provide notice of the hearing. *Id.* at 648 (quoting 8 C.F.R. § 1003.18(b)). Finally, the BIA relied on the legislative history, which shows that the purpose of the stop-time rule was "to prevent aliens from being able to 'buy time'" and delay proceedings so that they would qualify "for forms of relief that were unavailable to them when proceedings were initiated." *Id.* at 649.

C. The Courts of Appeals Conflict Regarding Whether Incomplete Notice Triggers The Stop-Time Rule.

After *Camarillo*, five circuits, including the two that had previously adopted the opposite interpretation, deferred to the BIA under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079 (9th Cir. 2015); *Guaman-Yuqui v. Lynch*, 786 F.3d 235 (2d Cir. 2015); *Gonzalez-Garcia v. Holder*, 770 F.3d 431 (6th Cir. 2014); *Wang v. Holder*, 759 F.3d 670 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736 (4th Cir. 2014). The Third Circuit, however, carefully considered those decisions and reached the opposite conclusion. *Orozco-Velasquez v. Attorney General*, 817 F.3d 78 (3d Cir. 2016).

1. The Fourth Circuit was the first of the circuits to defer to the BIA's interpretation. DHS served Urbina with a notice that did not include the date and time of his hearing "shortly before the statute's ten years would [have] accrue[d]." 745 F.3d at 738. The court held, with only cursory analysis, that "[b]oth the BIA's and Urbina's readings are plausible in light of the text," and that the BIA's choice of the "definitional" interpretation "merits deference" under *Chevron*'s second step. 745 F.3d at 740.

The Seventh Circuit in *Wang* followed suit, concluding that the Fourth's Circuit's decision to defer to the BIA "makes sense to us." 759 F.3d at 674. DHS served Wang with an incomplete notice to appear only two days after Wang arrived in the United States. 759 F.3d at 671. The government never properly served a hearing notice, however, and over the next ten years Wang married and had two U.S.-citizen children, before finally seeking a hearing himself. *Id.* at 672. In addition to adopting the Fourth Circuit's reasoning, such as it was, the Seventh Circuit analogized DHS's failure to include the statutorily-required hearing date to a *pro se* litigant's failure to sign a notice of appeal, which this Court held was a "curable defect" in *Becker v. Montgomery*, 532 U.S. 757 (2001). *Wang*, 759 F.3d at 674.

Over the next year and a half, the Sixth, Second, and Ninth Circuits joined the Fourth and Seventh Circuits in deferring to the BIA. The reasoning in those decisions was largely identical to the reasoning from the Fourth and Seventh Circuit decisions. *Gonzalez-Garcia*, 770 F.3d at 434-35; *Guaman-Yuqui*, 786 F.3d at 238-40; *Moscoso-Castellanos*, 803 F.3d at 1082-83. Though the Second and Ninth Circuits had

previously held that an incomplete notice does *not* trigger the stop-time rule, those courts reversed course in light of *Camarillo*. *Guaman-Yuqui*, 786 F.3d at 240-41; *Moscoso-Castellanos*, 803 F.3d at 1082 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984-85 (2005)).

2. The Third Circuit rejected these decisions and held that the statutory language unambiguously requires service of all of the information required in the statutory definition of a "notice to appear" before the stop-time rule applies. *Orozco-Velasquez*, 817 F.3d at 82-86.

Orozco-Velasquez had been continuously present in the United States for at least nine years when DHS served him with a notice ordering him to appear before an IJ at some unspecified future date and time. *Id.* at 79. Almost two years later, DHS served him with an additional notice that informed him of the date and time his proceedings would commence. *Id.* Relying on *Camarillo*, the BIA concluded that Orozco-Velasquez was ineligible for cancellation of removal. *Id.* at 80.

The Third Circuit granted Orozco-Velasquez's petition for review. The court "disagree[d] with those of our sister circuit courts of appeals that have found ambiguity in § 1229b(d)(1)'s 'stop-time' definition." *Id.* at 82. The court explained that § 1229(a) specifies the precise information that "shall" be included in a "written notice" for that notice to constitute a "notice to appear." *Id.* at 82. Section 1229b(d)(1), in turn, "specifically incorporates the aforementioned notice requirements" by triggering the stop-time rule only on service of a "notice to appear under section 1229(a)." *Id.* Thus, the court held, the statute un-

ambiguously provides that written notice lacking the information required by § 1229(a) is not a "notice to appear under section 1229(a)," and hence does not trigger the stop-time rule. *Id.* at 82-83.

The court further explained that the BIA's "definitional" reading of the statute, under which service of any document labeled as a "notice to appear" triggers the stop-time rule, would lead to absurd results. Under the BIA's reading, "a 'notice to appear' containing no information whatsoever [could be] a 'stop-time' trigger, permitting the government to fill in the blanks (or not) at some unknown time in the future." *Id.* at 84. This result "contradicts the plain text of the INA's 'stop-time' and [notice-to-appear] provisions." *Id.*

D. The First Circuit In This Case Rejects The Third Circuit's Decision, Deepening The Circuit Conflict.

1. Petitioner Wescley Pereira originally entered the United States on a tourist visa in June 2000, when he was 19 years old. Pet. App. 3a, 21a. He is now married and has two children, both of whom are U.S. citizens: Maria Luiza Gomes Fonseca, who is four years old, and Keiry Cristall Gomes Fonseca, who is eight years old. A.R. 23-25. Mr. Pereira and his family live on Martha's Vineyard, where Mr. Pereira works as a handyman and is the primary breadwinner for his family. A.R. 183-90. Mr. Pereira has become a well-respected member of the Martha's Vineyard community. His only criminal convictions, nearly a decade apart, were for an OUI in 2006 (when he was 26) that was ultimately expunged, and a conviction for driving on a suspended license. A.R.

41, 45. Neither of these crimes are removable offenses. The administrative record includes numerous letters from neighbors, friends, fellow churchgoers, and employers describing Mr. Pereira as not just a "wonderful, dedicated father and gentle husband," but a "hard worker" who is "as honest as they come," "goes out of his way to help not just his neighbors, but everyone that he can," and "contributes in a very positive way to our community." A.R. 183-190.

2. In May 2006, DHS personally served Mr. Pereira with a notice to appear, charging him as removable for overstaying his visa. That notice, however, did not state the date or time of his initial hearing. Pet. App. 3a. More than a year later, DHS filed the notice to appear with the immigration court, and the court tried to mail Mr. Pereira a notice setting the time of his hearing. However, the court used an incorrect mailing address, and the notice was returned as undeliverable. Pet. App. 3a & n.1, 21a. The court held a hearing in absentia and ordered Mr. Pereira removed. Pet. App. 3a.

Mr. Pereira remained in the United States, having never received any hearing notice, and having no knowledge of the in absentia removal order.

3. In March 2013, after Mr. Pereira had been physically present in the United States for well over ten years, he was pulled over for not having his headlights on. He was ultimately detained by DHS. Pet. App. 3a; A.R. 45. Because the immigration court had sent the 2007 hearing notice to the wrong address, the IJ reopened the removal proceedings.

Mr. Pereira applied for cancellation of removal under § 1229b(b)(1). Pet. App. 3a-4a. He argued that

his period of continuous presence continued after the 2006 notice because that notice did not identify when he was to appear, as required by statute. *Id.* Relying on the BIA's decision in *Camarillo*, the IJ pretermitted the application, and the BIA affirmed. Pet. App. 4a, 17a-25a.

4. The First Circuit denied a petition for review. In applying *Chevron*'s first step, the court expressly "disagree[d] with the Third Circuit's holding that the stop-time rule unambiguously incorporates the requirements of § 1229(a)(1)." Pet. App. 9a. The court recognized that "§ 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." Pet. App. 8a. But it nevertheless found the statute ambiguous because the stop-time rule "does not explicitly state" that a notice to appear must satisfy that duty "in order to cut off an alien's period of continuous physical presence." Pet. App. 9a. The court acknowledged that the stop-time rule explicitly referenced a notice to appear "under § 1229(a)," but concluded that this language does not "clearly indicate" that the written notice necessary to trigger the stop-time rule must satisfy the requirements for a notice to appear under § 1229(a). *Id.*

Like the Sixth and Seventh Circuits, the court also relied on this Court's decision in *Becker* generously construing a *pro se* filing. The court reasoned that if "an unsigned notice of appeal could qualify as timely filed, even if the missing signature was not provided within the filing period," the government's failure to provide a date and time of an initial removal hearing "may be a 'curable' defect that does not prevent the notice from serving its purpose." Pet. App. 8a.

The court acknowledged that, as the Third Circuit explained, even a blank notice to appear would trigger the stop-time rule under the BIA's reasoning. Pet. App. 8a-9a n.5. The court did not explain how that reasoning could be consistent with the statute, but instead stated that because "the facts of this case involve only an initially omitted, but later provided, hearing date, . . . this case does not require us to define the boundaries of our deference to the agency's statutory construction of the applicable provisions." *Id.*

Having found the statutory language ambiguous, the First Circuit then concluded, under *Chevron*'s second step, that the BIA's interpretation was a permissible one. The court agreed with the BIA that its interpretation was supported by the statutory structure, the administrative context, and the legislative history. Pet. App. 9a-14a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the circuit conflict concerning whether notice that does not meet § 1229(a)'s definition of a "notice to appear" nevertheless constitutes a "notice to appear under section 1229(a)," triggering the stop-time rule. That issue is vitally important. It arises frequently, as the seven published appellate decisions addressing the issue in just over three years demonstrate. And when that issue determines eligibility for cancellation, it can have a life-changing impact not only on cancellation applicants, but also on their U.S.-citizen children and spouses who would suffer "exceptional and extremely unusual hardship" if their mother, father, or spouse were removed from the country. 8

U.S.C. § 1229b(b)(1)(D). Immigrants like Mr. Pereira should not be denied the opportunity to seek this fundamental form of relief because their removal proceedings took place in Massachusetts instead of Pennsylvania.

Certiorari is particularly important because the BIA's reading of the statute is so clearly wrong. To stop the clock, the government must serve "a notice to appear under § 1229(a)." 8 U.S.C. § 1229b(d)(1). Section 1229(a) then defines a "notice to appear" as "written notice . . . specifying the following: . . . (G)(i) The time and place at which the proceedings will be held." When DHS serves notice that does *not* specify the time or place at which proceedings will be held, DHS has not served a "notice to appear under § 1229(a)," and has not stopped the period of continuous residence. And even if the definition did not foreclose the BIA's interpretation, the statutory structure and legislative history confirm the statute's unambiguous meaning: labeling a piece of paper a "notice to appear" does not make it one.

This case is an ideal vehicle to resolve the circuit conflict. Mr. Pereira has preserved the question presented throughout his proceedings. The IJ and BIA decisions make clear that the question presented is dispositive of Mr. Pereira's eligibility for cancellation of removal. And Mr. Pereira has a strong case for cancellation on the merits: He is the primary breadwinner for his two young, U.S.-citizen children, and is a beloved, respected, and hard-working member of the Martha's Vineyard community.

I. The Court Should Grant Certiorari To Resolve A Circuit Conflict On An Important And Recurring Issue Concerning Eligibility For Cancellation Of Removal.

The acknowledged circuit conflict concerning the question presented in this case cannot be resolved without this Court's intervention. Given how frequently that question arises, and how important it is when it does arise, this Court should grant certiorari now to resolve the conflict.

1. There is a clear circuit conflict concerning whether written notice that does not provide notice of the date and time of the initial hearing ends an immigrant's period of continuous residence for purposes of cancellation of removal. Pet. App. 9a. The Third Circuit has held that such notice does *not* end the period of continuous residence. Pp. 11-12, *supra*. The First, Second, Fourth, Sixth, Seventh and Ninth Circuits have all felt constrained by deference principles to disagree, deferring to the BIA's decision that so long as DHS serves a document that it labels a "notice to appear," it does not matter whether the document meets the statutory requirements for an actual notice to appear. Pp. 10-11, 14-15, *supra*. The seven circuits that have addressed this issue handle the vast majority—approximately 86%[2]—of petitions for review from the BIA.

This circuit conflict inevitably leads to unfair results. If Mr. Pereira lived in Pennsylvania, he could have applied for cancellation of removal and sought

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[2] *See* U.S. Courts, Judicial Business, Table B-3 (2016), available at http://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2016.pdf.

to stay in the United States to continue to care for his wife and U.S.-citizen daughters. Indeed, given that venue in immigration cases depends on where the government initiates removal proceedings, 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 1003.14(a), Mr. Pereira may have been able to apply for cancellation if he had been pulled over and detained by DHS while on a road trip through Pennsylvania, rather than at home in Massachusetts. Only this Court can alleviate the inevitable inequities caused by the disparate interpretations of the stop-time rule across the circuits.

2. This circuit conflict will not resolve without this Court's intervention. The Third Circuit rejected the BIA's position after five courts had already deferred to the BIA. The Third Circuit explicitly considered those decisions—with the benefit of *amicus* counsel appointed to address this specific issue—and "disagree[d] with . . . our sister circuit courts of appeals." *Orozco-Velasquez*, 817 F.3d at 80, 83. There is thus no reason the Third Circuit would alter its position.[3] The First Circuit's decision in this case ends any chance that the other courts of appeals would change course to agree with the Third Circuit: The First Circuit explicitly "disagree[d] with the Third Circuit's holding" and endorsed the majority approach. Pet. App. 9a. Only this Court's intervention can resolve the conflict. And further percolation is unlikely to be of any benefit to the Court, because the decision below and decisions agreeing with it rest on deference to the BIA.

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[3] After losing *Orozco-Velasquez*, the government did not even ask the full Third Circuit to reconsider its decision.

3. Granting certiorari now is particularly necessary given that the issue dividing the circuits is both frequently recurring and vitally important to immigrants. As the seven published opinions in just over three years demonstrate, the key facts recur regularly: DHS regularly serves notices to appear without providing any information concerning when the immigrant is actually supposed to appear. The immigrant often waits a year or more before receiving any proper notice of a hearing date. *E.g.*, Pet. App. 3a; *Wang*, 759 F.3d at 671-72. And by the time that notice arrives, the immigrant often has crossed over the ten-year mark (or seven-year mark for permanent residents).

Ineligibility based on the stop-time rule will often determine whether families with U.S.-citizen spouses and children can remain intact. The immigrants affected by this rule are those who could obtain cancellation on the merits, if only they were found eligible—permanent residents who have made positive contributions to their community, and longtime non-permanent residents with good records, good character, and a spouse, parent, or child who is a citizen or lawful permanent resident. 8 U.S.C. § 1229b(a), (b)(1). By definition, rendering ineligible a non-permanent resident who would otherwise qualify would work "exceptional and extremely unusual hardship"—on children separated from a parent, on a husband or wife separated from a spouse. *Id.* § 1229b(b)(1)(D). Only this Court can resolve the conflict and prevent the conflicting circuit decisions from separating families arbitrarily—and erroneously.

II. Certiorari Is Particularly Important Because The BIA's Interpretation Is Wrong.

The circuit conflict at issue in this case is particularly pernicious because the Third Circuit's position is the right one. The statute's plain text makes clear that the stop-time rule does not end the period of continuous residence until the immigrant has been served with *all* the information that together constitutes a "notice to appear under section 1229(a)." Applying the traditional tools of statutory interpretation, including statutory structure and legislative history, strengthens that straightforward reading of the statute. Given the text's clarity, the Third Circuit correctly concluded that the BIA's statutory interpretation fails at *Chevron*'s first step.

The BIA and First Circuit decisions cannot be justified by what the First Circuit described as the "administrative context." This "context" refers to DHS's regulation that specifically authorizes service of an initial notice to appear that does *not* include the date and time of the hearing. Even if this regulation endorsing a two-step notice process is valid, it cannot justify the BIA's counter-textual statutory interpretation of the stop-time rule. Perhaps DHS can, for its own convenience, authorize service of a notice to appear using multiple steps. But under the statute's plain text, the immigrant's period of continuous residence runs until he receives the information required by the statute. If DHS wants to use a multi-step process, it cannot stop the clock just by taking the first step.

A. Under The Statute's Unambiguous Text, Notice That Does Not Specify The Required Information Is Not A "Notice To Appear," And Does Not Stop Accrual Of Continuous Residence.

The statutory language is crystal clear: Regardless what label DHS places on a particular document, that document is only a "notice to appear under section 1229(a)" if it includes the information listed in § 1229(a)'s definition of a "notice to appear." The BIA's contrary reading—which allows a document to end an immigrant's continuous residence based purely on the caption, not the contents—directly conflicts with the clear statutory text, and would lead to absurd results.

1. Congress left no ambiguity concerning what DHS needs to do to trigger the stop-time rule. Under that rule, an immigrant's "continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). This provision does not give DHS authority to define what constitutes a notice to appear that triggers the stop-time rule. Instead, by its clear terms, the statute triggers the stop-time rule only on service of a "notice to appear *under section 1229(a)*."

Section 1229(a) states that "in this section," the term "notice to appear" means "written notice . . . specifying the following." 8 U.S.C. § 1229(a)(1). It then lists the precise information that must be included for a document to be a "notice to appear." This includes not only the "time and place at which the proceedings will be held," but also, among other things, the "acts or conduct alleged to be in violation

of the law," the "charges against the alien and the statutory provisions alleged to have been violated," the fact that the "alien may be represented by counsel," and the "consequences . . . of the failure, except under exceptional circumstances, to appear at such proceedings." *Id.* Nothing in § 1229(a) gives DHS the authority to redefine a notice to appear as anything other than written notice of *all* the information required by the statute.

Taken together, these two provisions unambiguously provide that the stop-time rule only ends an immigrant's period of continuous presence when the immigrant is served with written notice of the specific information listed in § 1229(a)(1). Only written notice of that information constitutes a "notice to appear under section 1229(a)."

The BIA and the court of appeals' attempt to find ambiguity in these straightforward provisions fail.[4] The BIA's primary reasoning was that the phrase "notice to appear under section 1229(a)" could be read to "merely specif[y] the document the DHS must serve on the alien to trigger the 'stop-time' rule," and not to "impose substantive requirements for a notice to appear to be effective in order for that trigger to occur." *Camarillo*, 25 I. & N. Dec. at 647.

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[4] The court of appeals was bound by this Court's precedent to hold that if the statute is ambiguous, the BIA's interpretation prevails even if it is not the best reading of the statute—and even though before the BIA's interpretation, the courts of appeals had unanimously come out the other way. On the merits, this Court would be free to revisit that methodological premise if necessary. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring).

The courts of appeals that agreed with the BIA's finding of ambiguity added little additional reasoning. The First Circuit in this case, for instance, reasoned that the "stop-time rule does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence," and that the reference to a notice to appear "under § 1229(a)" "does not clearly indicate whether the rule incorporates the requirements of that section." Pet. App. 9a. The Sixth and Seventh Circuits adopted similar reasoning. *Wang*, 759 F.3d at 674; *Gonzalez-Garcia*, 770 F.3d at 434.

As the Third Circuit correctly recognized, this reasoning is directly at odds with the statutory text. Section 1229(a) defines a "notice to appear" as not just a document with a certain *title*, but as a document with specific *contents*. The BIA never explained how a "notice to appear under section 1229(a)" could be read to include a notice that does not satisfy the definition of a "notice to appear" under that section. Indeed, in an analogous context, this Court interpreted the phrase "adjudication under section 554" to "unambiguous[ly]" refer not to any agency proceeding of the general "type" addressed in 5 U.S.C. § 554, but only to a hearing meeting the specific requirements listed in that section. *Ardestani v. INS*, 502 U.S. 129, 134-36 (1991). Similarly here, Congress left no interpretive gap for the BIA to fill—it made clear that the stop-time trigger is service of written notice that includes the information specified in § 1229(a)'s definition.

2. The BIA's interpretation would lead to unreasonable results that Congress could not have intend-

ed. As the Third Circuit explained, the BIA's interpretation would mean that any document DHS labeled a "notice to appear" would trigger the stop-time rule, regardless whether that document provided *any* of the information listed in § 1229(a)(1), or even any information at all. *Orozco-Velasquez*, 817 F.3d at 84 ("Taken to its logical conclusion, the agency's approach might treat even a 'notice to appear' containing no information whatsoever as a 'stop-time' trigger."). Section 1229(a)(1) lists information vital to an immigrant's ability to meaningfully appear at a hearing—for instance, "the charges against the alien and the statutory provisions alleged to have been violated," or the fact that the "alien may be represented by counsel," not to mention the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1). Far from disputing that its interpretation would allow DHS to trigger the stop-time rule by service of a notice to appear that included none of this information, the BIA described its reading of the statute as one that "does not impose substantive requirements for a notice to appear" to trigger the stop-time rule. *Camarillo*, 25 I. & N. Dec. at 647.

The BIA's non-substantive interpretation of a "notice to appear" makes no sense given the text Congress chose. Congress specifically triggered the stop-time rule on service of a "notice to appear *under section 1229(a)*," a section that defines that term to have a particular substantive meaning. And even the phrase "notice to appear" itself implies that the notice have *some* content—at the very least, notice of when, where, or why the immigrant was supposed to "appear."

Notably, several of the courts of appeals that deferred to the BIA were unwilling to accept these implications of the BIA's rule, and kept open the possibility that, if DHS omitted some other, unspecified information, the written notice would not trigger the stop-time rule. *E.g.*, Pet. App. 8a-9a n.5; *Urbina*, 745 F.3d at 740 ("We do not decide today whether a more egregious case might warrant a different result."); *Guaman-Yuqui*, 786 F.3d at 241 n.3 ("We have no occasion to address in this case whether other deficiencies in a notice to appear may preclude that notice from triggering the stop-time rule."). But none of these courts provided any explanation for distinguishing among the substantive requirements in § 1229(a)'s definition of a "notice to appear"—none explained, for instance, why written notice that omitted the "time and place" of the hearing should be treated any differently than written notice that omitted the "charges against the alien and the statutory provisions alleged to have been violated." 8 U.S.C. § 1229(a)(1)(D), (G)(i). Nothing in the statute gives the BIA (or the courts of appeals) the authority to pick and choose which requirements from the notice-to-appeal definition DHS can ignore while still triggering the stop-time rule.

3. The First Circuit and other courts of appeals erred in relying on this Court's holding in *Becker* that the Federal Rules of Civil Procedure allow an appellant to cure the failure to sign a notice of appeal. *See* Pet. App. 8a; *Gonzalez-Garcia*, 770 F.3d at 435; *Wang*, 759 F.3d at 674. *Becker* does not stand for the broad proposition that defective documents are effective because "a defective document nonetheless serves a useful purpose." *Wang*, 759 F.3d at 674; *see also* Pet. App. 8a. Instead, *Becker* was based on

an explicit provision in the Federal Rules that allows a party to promptly correct a specific defect, a failure to sign a document. 532 U.S. at 764 (citing Fed. R. Civ. P. 11(a)). Congress included no such provision in the stop-time rule. The BIA and courts do not have authority to decide when a document serves a sufficiently "useful purpose" to trigger the stop-time rule when Congress specified exactly what information a document must contain to trigger that rule.

B. Traditional Tools Of Statutory Interpretation Confirm The Statute's Unambiguous Text.

Normal tools of statutory interpretation, like statutory structure and legislative history, confirm that the plain reading of the statute's unambiguous text is the right one. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) ("normal tools of statutory interpretation" apply at *Chevron*'s first step).

1. The statutory structure supports the Third Circuit's interpretation. As the BIA and the First Circuit correctly recognized, the stop-time rule refers to a notice to appear "under section 1229(a)" generally, not 1229(a)(1) specifically. *Camarillo*, 25 I. & N. Dec. at 647-48; Pet. App. 11a. Within § 1229(a), paragraph (1) requires and defines a "notice to appear," and paragraph (2) provides procedures for notifying an immigrant of a "change in time or place of proceedings."

These provisions support interpreting the stop-time rule to end a period of continuous residence only upon service of a complete notice to appear. Section 1229b(d)(1) refers to a "notice to appear under section 1229(a)," and a "notice to appear" is only defined

in paragraph (1). That paragraph (2) includes provisions for *changing* the time of the proceedings only emphasizes that a notice to appear as defined in paragraph (1) must include the time of the proceedings—if it did not, then there would be nothing to "change" under paragraph (2).

The BIA and First Circuit's contrary reading misunderstands the statute's structure. The BIA claimed the structure supports its counter-textual reading because it shows that "Congress envisioned that circumstances beyond the control of the DHS would require a change in the hearing date and specifically provided that such notification could occur after the issuance of the notice to appear." *Camarillo*, 25 I. & N. Dec. at 647-48. That is true, but irrelevant. The fact that the statute allows hearing dates to be changed does not diminish the fact that it *also* requires that a notice to appear include the date when the immigrant is currently scheduled to appear. The First Circuit concluded that it would make "little sense" to trigger the stop-time rule "on the fulfillment of all of the requirements of § 1229(a), which include . . . notification of any subsequent changes to that date and time under § 1229(a)(2)." Pet. App. 11a. This argument attacks a straw man, as no one has argued that notice of a change in the time or place of a hearing under § 1229(a)(2) has any impact on the stop-time rule, so long as DHS served a complete notice to appear in the first place.

2. The legislative history supports interpreting the stop-time rule to end a period of continuous presence only once the government serves written notice of all of the information required by § 1229(a). Congress adopted the stop-time rule to prevent *immi-*

grants from using procedural maneuvers to delay proceedings and accrue the required period of presence or residence; Congress did not intend to end the period of continuous residence when *the government* delays the commencement of removal proceedings by failing to schedule and serve notice of a hearing.

The immigration laws have long provided the government with discretion to allow certain immigrants, those who had been in the country for a certain period, to remain in the United States even if they were otherwise inadmissible or deportable. *See, e.g.*, Immigration Act of 1917, § 3, proviso 7, 39 Stat. 878. The current cancellation–of removal provision is the latest version of this long-recognized discretionary form of relief. *See* H.R. Rep. No. 104-469, pt. I, at 231-33 (1996).

The stop-time rule was intended to address a very specific problem with these provisions: Because the immigrants continued to accrue residence during removal proceedings, immigrants had an incentive to obstruct and delay those proceedings to obtain the necessary period of continuous residence and apply for relief. As the BIA explained, this loophole allowed "aliens in deportation proceedings [to] knowingly file[] meritless applications for relief or otherwise exploit[] administrative delays in the hearing and appeal processes in order to 'buy time,' during which they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated." *Cisneros-Gonzalez*, 23 I. & N. Dec. at 670; *see also* H.R. Rep. No. 104-469, pt. I, at 121-122 (noting that noncitizens sought to "abuse[]" the

earlier laws by "seeking to delay proceedings until [the required residence period] has accrued").

Congress could have closed this loophole in many ways. For instance, it could have ended any period of continuous residence at the first removal hearing, or when the immigrant was first detained by immigration authorities.

Instead, as the statute's text demonstrates, Congress struck a particular balance: It gave DHS power to stop an immigrant's period of continuous residence, but only if DHS provides the immigrant with the specific information identified in the statute. This makes sense given the legislative history, which demonstrates longstanding Congressional intent to provide discretionary relief when an immigrant has been allowed to stay in the country based on government inaction, but to prevent *immigrants* from artificially delaying proceedings to become cancellation-eligible.

The BIA misconstrued this legislative history. It concluded that the legislative history supports its reading because a "primary purpose of a notice to appear," according to the BIA, "is to inform an alien that the Government intends to have him or her removed from the country," which can be accomplished without strictly following § 1229(a)(1). *Camarillo*, 25 I. & N Dec. at 650. Nothing in the legislative history, however, suggests that Congress wanted to trigger the stop-time rule any time the government informed an immigrant that it intended to have her removed—and even if it did, the statute's text explicitly rejects that reading of the statute. What the legislative history shows is just that Congress wanted to give the government the power to end the period of

continuous residence, which it did by allowing the government to trigger the stop-time rule by serving written notice of the information identified in § 1229(a)'s definition of a notice to appear.

The First Circuit relied on a different part of the legislative history that did not address the stop-time rule, but addressed separate provisions simplifying the notice provisions by creating the notice to appear. Pet. App. 13a-14a. As the First Circuit recognized, Congress's goal in creating the notice to appear was to avoid protracted disputes concerning whether the immigrant was properly served a hearing notice. Pet. App. 13a-14a. One mechanism Congress used was to require immigrants to update the government of their address when they moved. *Id.* But there was another important change the First Circuit ignored: while including the time of the removal hearing was optional in the earlier "order to show cause," Congress made it mandatory in the "notice to appear," thus consolidating notice procedures. *See* Immigration Act of 1990, § 545(a), Pub. L. No. 101-649, 104 Stat. 4978, 5061-62; 8 U.S.C. § 1229(a).

The legislative history of these simplified notice provisions undermines the BIA's interpretation of the statute. Though the First Circuit was correct that these provisions were intended to "prevent notice problems from dragging out the deportation process," Pet. App. 14a, the mechanism Congress selected to solve that problem was to *require that the date and time of the hearing be included in a notice to appear*. The First Circuit's conclusion that Congress would not have triggered the stop-time rule "on receipt of a hearing notice that may come months, or even years, after the initiation of deportation pro-

ceedings by DHS" thus makes no sense, as Congress specifically instructed that a hearing notice be included in the notice to appear itself.

In sum, the legislative history demonstrates Congress's concern with allowing immigrants to artificially delay removal proceedings to obtain eligibility for relief. Nothing in that history suggests that Congress intended to end eligibility for immigrants when delay is due to DHS's failure to promptly and properly serve notice of the specific information that constitutes a "notice to appear under section 1229(a)."

C. The BIA's Counter-Textual Reading Cannot Be Justified By Reference To The "Administrative Context."

The BIA and the First Circuit sought to justify their counter-textual statutory interpretation based on a desire to "accommodate the[] practical constraints" imposed by the "administrative context." Pet. App. 12a; *Camarillo*, 25 I. & N. Dec. at 648. As an initial matter, the BIA and First Circuit cannot ignore the statute's text because "practical constraints" make it difficult for DHS to trigger the stop-time rule. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The statute unambiguously triggers the stop-time rule on service of a particular document, and the BIA cannot deviate from that text, no matter how convenient such a deviation may be for DHS's administrative practice.

The BIA and First Circuit's accommodation of DHS's regulations is particularly inappropriate given

the nature of the regulation on which the BIA and First Circuit relied. That regulation, 8 C.F.R. § 1003.18(b), states that DHS "shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, *where practicable*." (Emphasis added). The regulation goes on to state that if that information is not included in the notice to appear, "the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place and date of hearing." *Id.* This regulation is in significant tension with the statute, which *requires* that a "notice to appear" specify the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). There is no reason to misinterpret the stop-time rule to accommodate a regulation that makes optional what the statute makes mandatory.

Section 1003.18(b) may be defensible on the ground that § 1229(a) does not require that the notice to appear be served as one document; so long as the government serves an immigrant with written notice of the required information, it has arguably served a "notice to appear" under § 1229(a). Courts that have refused to dismiss removal proceedings initiated based on § 1003.18(b)'s "two-step notice procedure" have adopted precisely this reasoning. *Popa v. Holder*, 571 F.3d 890, 895-96 (9th Cir. 2009) (holding that "the NTA and the hearing notice combined provided Popa with the time and place of her hearing, as required by 8 U.S.C. § 1229(a)(1)(G)(i)"); *see also, e.g.*, *Dababneh v. Gonzales*, 471 F.3d 806, 810 (7th Cir. 2006) ("Dababneh received an effective NTA that met the § [1229(a)] requirements through receipt of both the NTA and the NOH.").

This defense of § 1003.18(b), however, implicitly recognizes that the government has not served a "notice to appear under section 1229(a)" until it has served *both* an incomplete notice to appear *and* a notice of hearing. Until that point, the government has not served written notice of the information that, taken together, constitutes a "notice to appear" as § 1229(a) defines that term. And so long as the government has not served a "notice to appear under section 1229(a)," the immigrant's period of continuous residence continues to run.

The fact that, according to the BIA and the First Circuit, it is often "not practical" to include the date and time on a notice to appear is thus irrelevant. DHS is free to use the two-step notice procedure in § 1003.18(b), but the consequence of that administrative practice is that the immigrant's period of continuous residence continues to run until both steps of the notice procedure are complete. If DHS is concerned about that delay in stopping the period of continuous residence, it can simply follow the statutory text and obtain a hearing date before it serves the notice to appear.

Nothing in the administrative context justifies the BIA's counter-textual statutory interpretation. It makes no sense to justify triggering the stop-time rule on service of statutorily-inadequate notice based on a DHS regulation that authorizes DHS to serve statutorily-inadequate notice.

III. This Case Is An Ideal Vehicle To Resolve The Circuit Conflict.

1. Throughout his removal proceedings, Mr. Pereira has preserved his argument that the notice he

received in 2006 was not a "notice to appear under section 1229(a)" because it did not specify the date and time of his hearing. He made the argument clearly to the IJ, A.R. 140-42, who rejected it in his oral decision and order, Pet. App. 23a. Mr. Pereira raised the argument again on appeal to the BIA, A.R. 14-17, which rejected the argument based on *Camarillo*, Pet. App. 18a. Mr. Pereira again preserved the issue in his petition for review at the First Circuit, which rejected Mr. Pereira's argument, explicitly disagreeing with the Third Circuit's decision, under which Mr. Pereira would have been eligible for cancellation of removal. Pet. App. 9a.

2. The question whether the 2006 written notice triggered the stop-time rule is dispositive of Mr. Pereira's eligibility for cancellation of review. It is undisputed that the written notice DHS served in 2006 is the only notice Mr. Pereira received until after he had accrued ten years of continuous presence in the United States. It is similarly undisputed that Mr. Pereira has two U.S. citizen daughters. *See id.* § 1229b(b)(1)(D). Mr. Pereira is a devoted father, and his removal would undoubtedly cause his daughters "exceptional and unusual hardship." *Id.* Mr. Pereira has demonstrated "good moral character," *see id.* § 1229(b)(1)(B), and has no disqualifying criminal convictions under § 1229b(b)(1)(C).

That the immigration court tried unsuccessfully to mail Mr. Pereira a hearing notice in 2007 is irrelevant. It is undisputed that Mr. Pereira never received that 2007 notice because the immigration court sent it to the wrong mailing address, through no fault of Mr. Pereira's. Pet. App. 3a; A.R. 133-34, 194-95. The government has thus appropriately

never argued that the immigration court's failed attempt to mail the 2007 notice had any impact on Mr. Pereira's eligibility for cancellation of removal.

3. Mr. Pereira has a strong case that the Attorney General should cancel his removal. Mr. Pereira is the breadwinner for his family, including his U.S.-citizen daughters, Maria and Keiry, who are four and eight years old. The record already includes significant evidence that Mr. Pereira not only supports his family financially, but is also a loving and active father, and a respected member of the community in Martha's Vineyard. Mr. Pereira could introduce significantly more evidence if granted the opportunity to apply for cancellation.

* * * * *

Had Mr. Pereira been brought into immigration court in Philadelphia, rather than Boston, he could apply for cancellation of removal, and likely remain in the United States with his family. This Court should not allow such geographic happenstance to determine the fate of families across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 16-1033

WESCLEY FONSECA PEREIRA,

Petitioner,

v.

JEFFERSON B. SESSIONS III,*
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before

Lynch, Lipez, and Thompson,
Circuit Judges.

Jeffrey B. Rubin, with whom Rubin Pomerleau P.C. was on brief, for petitioner.

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Jefferson B. Sessions III has been substituted for former Attorney General Loretta E. Lynch as respondent.

Sarah K. Pergolizzi, Trial Attorney, Office of Immigration Litigation, with whom Bejamin C. Mizer, Acting Assistant Attorney General, Civil Division, Kohsei Ugumori, Senior Litigation Counsel, Office of Immigration Litigation, and Jesse D. Lorenz, Trial Attorney, Office of Immigration Litigation, were on brief, for respondent.

July 31, 2017

LIPEZ, Circuit Judge. The Immigration and Nationality Act ("INA") gives the Attorney General discretion to cancel the removal of a non-permanent resident alien if the alien meets certain criteria, including ten years of continuous physical presence in the United States. 8 U.S.C. § 1229b(b)(1). Under the "stop-time" rule, the alien's period of continuous physical presence ends "when the alien is served a notice to appear under section 1229(a)" of the INA. *Id.* § 1229b(d)(1). In this case, we must decide whether a notice to appear that does not contain the date and time of the alien's initial hearing is nonetheless effective to end the alien's period of continuous physical presence. The Board of Immigration Appeals ("BIA") answered this question affirmatively in *Matter of Camarillo*, 25 I. & N. Dec. 644 (B.I.A. 2011). The BIA applied that rule in this case.

Joining the majority of circuit courts to address this issue, we conclude that the BIA's decision in *Camarillo* is entitled to *Chevron* deference. We deny the petition for review.

I.

Wescley Fonseca Pereira ("Pereira"), a native and citizen of Brazil, was admitted to the United States in June 2000 as a non-immigrant visitor authorized to stay until December 21, 2000. He overstayed his visa. In May 2006, less than six years after Pereira entered the country, the Department of Homeland Security ("DHS") personally served him with a notice to appear. The notice did not specify the date and time of his initial removal hearing, but instead ordered him to appear before an Immigration Judge ("IJ") in Boston "on a date to be set at a time to be set." More than a year later, DHS filed the notice to appear with the immigration court, and the court mailed Pereira a notice setting his initial removal hearing for October 31, 2007 at 9:30 A.M. Because the notice was sent to Pereira's street address on Martha's Vineyard rather than his post office box, however, he never received it.[1] When Pereira failed to appear at the hearing, an IJ ordered him removed in absentia.

Pereira was not removed, however, and he remained in the country. In March 2013, more than five years later, Pereira was arrested for a motor vehicle violation and detained by DHS. Pereira retained an attorney, who filed a motion to reopen his removal proceedings, claiming that Pereira had never received the October 2007 hearing notice. After an IJ allowed the motion, Pereira conceded removability, but sought relief in the form of

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[1] According to Pereira, such a problem is not uncommon for residents of Martha's Vineyard, who often receive mail through a post office box rather than at their home addresses.

cancellation of removal under 8 U.S.C. § 1229b(b)(1).[2] Arguing that the notice to appear was defective because it did not include the date and time of his hearing, Pereira contended that it had not "stopped" the continuous residency clock. He asserted that he had instead continued to accrue time for the purpose of § 1229b(b)(1) until he received a notice of the hearing that occurred after his case was reopened in 2013.

The IJ pretermitted Pereira's application for cancellation of removal, finding that Pereira could not establish the requisite ten years of continuous physical presence, and ordered him removed. Pereira appealed to the BIA. On appeal, he conceded that *Camarillo* foreclosed his argument that the stop-time rule did not cut off his period of continuous physical presence until 2013, but argued that *Camarillo* should be reconsidered and overruled. The BIA declined to reconsider *Camarillo* and affirmed the IJ's decision, holding that the notice to appear was effective under the stop-time rule despite the missing details concerning the date and time of his hearing.[3] Pereira timely filed a petition for review with this court.

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[2] Pereira also applied for voluntary departure, a request that he later withdrew. In addition, he asked DHS to exercise its prosecutorial discretion to allow him to remain in the country with his wife and two American citizen daughters. DHS denied that request.

[3] Pereira also asked the BIA to administratively close his case, or to remand it to the IJ to consider termination or administrative closure while he submitted a second application to DHS seeking prosecutorial discretion, this time pursuant to a recently announced program. The BIA denied Pereira's request,

II.

A. Standard of Review

Because "the BIA adopted and affirmed the IJ's ruling, and discussed some of the bases for the IJ's opinion, we review both the BIA's and IJ's opinions." *Idy v. Holder*, 674 F.3d 111, 117 (1st Cir. 2012). Where, as here, the case presents a question of statutory interpretation, we review the BIA's legal conclusions de novo, but give "appropriate deference to the agency's interpretation of the underlying statute in accordance with administrative law principles." *Id.* (quoting *Gailius v. INS*, 147 F.3d 34, 43 (1st Cir. 1998)). Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, we first look to the statutory text to ascertain whether "Congress has directly spoken to the precise question at issue." 467 U.S. 837, 842 (1984). If the statute addresses the question at issue and is clear in its meaning, then we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the statute is silent or ambiguous, we determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. We defer to an agency's construction of an ambiguous statutory provision "unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Saysana v. Gillen*, 590 F.3d 7, 13 (1st Cir. 2009) (quoting *Chevron*, 467 U.S. at 844).

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stating that DHS had sole authority over prosecutorial discretion decisions and that prosecutorial discretion did not, therefore, provide a basis upon which the BIA could remand or administratively close the case.

B. Analysis

1. *Chevron* Step One: Ambiguity of the Statute

To qualify for cancellation of removal, an alien must meet several criteria, including a showing that he "has been physically present in the United States for a continuous period of not less than 10 years." 8 U.S.C. § 1229b(b)(1)(A). We focus on the language of the stop-time rule, 8 U.S.C. § 1229b(d)(1), which cuts off that period of physical presence "when the alien is served a notice to appear under section 1229(a)."[4]

The referenced provision, § 1229(a), contains three subsections, the first of which states:

> In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following: . . . .

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[4] The full text of the provision reads:

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. § 1229b(d)(1).

Id. § 1229(a)(1). That subsection goes on to specify ten items, including the charges against the alien, the alien's alleged illegal conduct, and "[t]he time and place at which the proceedings will be held." *Id.* The second subsection provides a procedure for notifying the alien in the event of a change in the time or place of the initial removal hearing. *See id.* § 1229(a)(2). The third subsection directs the Attorney General to "create a system to record and preserve" the addresses and telephone numbers of aliens who have been served with notices to appear. *Id.* § 1229(a)(3).

Pereira argues that the stop-time rule's reference to "a notice to appear under § 1229(a)" unambiguously requires that the notice include all of the information specified in § 1229(a)(1), including the date and time of the initial removal hearing. Otherwise, he claims, the notice is not, in fact, a "notice to appear," and it cannot trigger the stop-time rule. According to Pereira, however, all ten items listed in § 1229(a)(1) need not be provided in the same document. Instead, two or more documents that together contain all ten items (such as the notice served on Pereira in 2006 and the hearing notice he received in 2013) could, in combination, serve as a "notice to appear." In that case, the stop-time rule would not be triggered until both documents had been served on the alien.

For support, Pereira cites a recent decision by the Third Circuit, which found that the language of § 1229b(d)(1) unambiguously requires that the date and time of the hearing be provided before the stop-time rule is triggered. *See Orozco-Velasquez v. Att'y*

Gen. United States, 817 F.3d 78, 81-82 (3d Cir. 2016). The court relied upon § 1229(a)(1)'s commandment that a notice to appear specifying the ten pieces of information listed "*shall* be given in person to the alien." *Id.* at 83. Explaining that the word "shall" "conveys a mandatory rather than a hortatory instruction," the court concluded that only a notice or set of notices that "conveys the *complete* set of information prescribed by § 1229(a)(1)" could "stop the continuous residency clock." *Id.*

The word "shall," however, appears in § 1229(a)(1), not in the stop-time rule itself. It is undisputed that § 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision. But whether a notice to appear that omits some of this information nonetheless triggers the stop-time rule is a different question. As the Seventh Circuit has observed, even if such an omission renders a notice to appear defective, "a defective document [may] nonetheless serve[] a useful purpose." *Wang v. Holder*, 759 F.3d 670, 674 (7th Cir. 2014); *see also Gonzalez-Garcia v. Holder*, 770 F.3d 431, 435 (6th Cir. 2014) (quoting *Wang*, 759 F.3d at 674). In *Becker v. Montgomery*, the Supreme Court held that an unsigned notice of appeal could qualify as timely filed, even if the missing signature was not provided within the filing period. 532 U.S. 757, 760 (2001). Here, just as there, the missing item may be a "curable" defect that does not prevent the notice from serving its purpose.[5]

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[5] Pereira also cites *Orozco-Velasquez* for the argument that "[t]aken to its logical conclusion, the agency's approach might treat even a 'notice to appear' containing no information

We thus disagree with the Third Circuit's holding that the stop-time rule unambiguously incorporates the requirements of § 1229(a)(1). The stop-time rule does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence. *See* 8 U.S.C. § 1229b(d)(1). Moreover, the rule's reference to a notice to appear "under" § 1229(a) does not clearly indicate whether the rule incorporates the requirements of that section. *See id.* Thus, we find the statutory language of the stop-time rule ambiguous. Pereira cannot, therefore, prevail at the first step of the *Chevron* inquiry, and we must proceed to step two.

2. *Chevron* Step Two: Permissibility of the Agency's Interpretation

The BIA's decision in this case relied on its precedential opinion in *Camarillo*, in which the BIA announced its position on the statutory question we face here. *See* 25 I. & N. Dec. at 645. Finding more than one plausible interpretation of the stop-time rule, the BIA in *Camarillo* determined that the statutory language was ambiguous. *Id.* at 647. The agency explained that, instead of incorporating the

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whatsoever as a 'stop-time' trigger." 817 F.3d at 84. Because the facts of this case involve only an initially omitted, but later provided, hearing date, and the BIA's opinion made no assertions about the extension of *Camarillo* to other contexts, this case does not require us to define the boundaries of our deference to the agency's statutory construction of the applicable provisions. *See, e.g., Lopez-Soto v. Hawayek*, 175 F.3d 170, 177 (1st Cir. 1999) (explaining that the facts of the case presented "no occasion to address . . . looming issues" that might become relevant in other contexts).

requirements of § 1229(a) as Pereira suggests here, the rule's reference to "a notice to appear under section 1229(a)" could also be construed as "simply definitional." *Id.* That is, the reference may "merely specif[y] the document the DHS must serve on the alien to trigger the 'stop-time' rule," without "impos[ing] substantive requirements for a notice to appear to be effective" in triggering that rule. *Id.*

After examining the structure of the statute, the administration of the statute's requirements, and the statute's legislative history, the agency concluded that the "definitional" construction of the stop-time rule was the better reading. *Id.* at 651. The BIA applied that holding from *Camarillo* in this case. We are obligated to defer to the BIA as long as its chosen construction is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 457 U.S. at 844. We thus must determine whether the BIA adopted a permissible construction of the stop-time rule.

a. Statutory Structure

In *Camarillo*, the agency began its analysis by examining the structure of the INA and, more specifically, the relevant provisions. It noted that § 1229(a) is "the primary reference in the [INA] to the notice to appear," and that this section defines the term "notice to appear." *Camarillo*, 25 I. & N. Dec. at 647. Thus, the BIA explained, it seems logical that Congress would reference § 1229(a) "to specify the document the DHS must serve on the alien to trigger the 'stop-time' rule," supporting a "definitional" reading of the reference. *Id.*

Looking to the language of the stop-time rule, the BIA then noted that the rule refers not just to § 1229(a)(1), the provision specifying the information that must be included in a notice to appear, but instead it broadly references the entirety of § 1229(a). *Id.*; *see also* 8 U.S.C. § 1229b(d)(1). As noted above, the second subsection of § 1229(a) "outlin[es] the procedures [for DHS] to follow when notice must be given" of changes in the date or time of the initial removal hearing. *Camarillo*, 25 I. & N. Dec. at 647-48; *see also* § 1229(a)(2). This provision "clearly accounts for [the] reality" that such details "are often subject to change," and "indicates that Congress envisioned that . . . notification [of a change in hearing date] could occur after the issuance of the notice to appear." *Camarillo*, 25 I. & N. Dec. at 647-48.

We agree with the thrust of the BIA's reasoning. It would make little sense for the stop-time rule's reference to "a notice to appear under section 1229(a)" to condition the triggering of the rule on the fulfillment of all of the requirements of § 1229(a), which include not just notification of the initial date and time of the removal hearing under § 1229(a)(1), but also notification of any subsequent changes to that date and time under § 1229(a)(2).[6]

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[6] Notably, Pereira neither addresses whether the stop-time rule incorporates § 1229(a)(2) and (a)(3), nor argues that the rule somehow incorporates only the requirements of § 1229(a)(1).

b. Administrative Context

The BIA further reasoned that the "definitional" approach best accords with the process through which enforcement proceedings are initiated. While DHS drafts and serves the notice to appear, the immigration court sets the date and time of the hearing. *See id.* at 648, 650; *see also* 8 C.F.R. § 1003.18. The BIA observed that because "DHS frequently serves [notices to appear] where there is no immediate access to docketing information," *Camarillo*, 25 I. & N. Dec. at 648 (alteration in original) (quoting *Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006)), "it is often not practical to include the date and time of the initial removal hearing on the notice to appear," *id.* An interpretation of the statute that allows the stop-time rule to take effect without requiring separate action by the immigration courts would, therefore, accommodate these practical constraints.

c. Legislative History

The BIA also relied upon the legislative history of the stop-time rule. The rule was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, which amended various portions of the INA. Before the enactment of the stop-time rule, the agency explained, "[an] otherwise eligible person could qualify for suspension of deportation [now known as "cancellation of removal"] if he or she had been continuously physically present in the United States for [the requisite period], regardless of whether or when the Immigration and Naturalization Service had initiated deportation

proceedings against the person through the issuance of" the document that, at that time, served as a notice to appear. *Camarillo*, 25 I. & N. Dec. at 649-50 (first alteration in original) (quoting *Matter of Nolasco*, 22 I. & N. Dec. 632, 640 (B.I.A. 1999) (quoting 143 Cong. Rec. S12265, S12266 (daily ed. Nov. 9, 1997))). "[T]he 'stop-time' rule was enacted to address 'perceived abuses arising from'" this legal loophole by "prevent[ing] aliens from being able 'to "buy time[]" [through tactics such as requesting multiple continuances,] during which they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated.'" *Id.* at 649 (quoting *Matter of Cisneros*, 23 I. & N. Dec. 668, 670 (B.I.A. 2004) (quoting H.R. Rep. 104-469, pt. I, at 122 (1996))). Thus, the BIA concluded, "Congress intended for the 'stop-time' rule to break an alien's continuous physical residence or physical presence in the United States when . . . DHS[] serves the charging document," regardless of whether that document contains a hearing date. *Id.* at 650.

The legislative history reflects Congress's concern about delay and inefficiency in the immigration process that it sought to address through the enactment of IIRIRA. Specifically, a report of the Judiciary Committee of the House of Representatives notes that "lapses (perceived or genuine) in the procedures for notifying aliens of deportation proceedings [had led] some immigration judges to decline to exercise their authority to order an alien deported in absentia." H.R. Rep. 104-469, pt. I, at 122. The creation of the "notice to appear" was intended to prevent "protracted disputes concerning

whether an alien has been provided proper notice of a proceeding" by informing aliens that they are required to notify the government of any changes in their contact information. *Id.* at 159; *see* 8 U.S.C. § 1229(a)(1)(F) (stating that a notice to appear shall include "[t]he requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted" and "[t]he requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number"). Given Congress's intent in enacting IIRIRA to prevent notice problems from dragging out the deportation process, it would make little sense for Congress to have created the potential for further delays by conditioning the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings by DHS.

d. Conclusion

In light of the relevant text, statutory structure, administrative context, and legislative history, the BIA's construction of the stop-time rule is neither arbitrary and capricious nor contrary to the statute. *See Chevron*, 467 U.S. at 844. It is thus a permissible construction of the statute to which we defer.[7] *See id.* In so holding, we join five other

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[7] To the extent the government suggests that our holding is dictated by *Cheung v. Holder*, 678 F.3d 66 (1st Cir. 2012), Pereira correctly points out that the notice to appear in that case was not alleged to have omitted any of the required information. Instead, Cheung addressed the application of the

circuits that have granted *Chevron* deference to the BIA's interpretation in published opinions.[8] *See Guaman-Yuqui v. Lynch*, 786 F.3d 235, 240 (2d Cir. 2015) (per curiam); *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015);[9] *Gonzalez-Garcia*, 770 F.3d at 43435; *Wang*, 759 F.3d at 675; *Urbina v. Holder*, 745 F.3d 736, 740 (4th Cir. 2014). *But see Orozco-Velasquez*, 817 F.3d at 82-83.

III.

Because we defer to the BIA's interpretation of the stop-time rule, we agree with the agency's conclusion that Pereira's period of continuous physical presence ended when he was served with a notice to appear in 2006. At that point, he had been present in the United States for less than six years. Unable to demonstrate the requisite ten years of physical presence, Pereira is ineligible for cancellation of

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stop-time rule when the government later withdraws the charges stated in the notice and substitutes a different set of charges. See 678 F.3d at 69. Thus, that precedent is not controlling.

[8] The Eleventh Circuit also granted the BIA's construction Chevron deference in an unpublished opinion, *see O'Garro v. U.S. Att'y Gen.*, 605 F. App'x 951, 953 (11th Cir. 2015) (per curiam), and accepted the BIA's construction without conducting a Chevron analysis in *Hernandez-Rubio v. U.S. Att'y Gen.*, 615 F. App'x 933, 934 (11th Cir. 2015) (per curiam).

[9] Pereira cites *Garcia-Ramirez v. Gonzales*, a pre-*Camarillo* case in which the Ninth Circuit held, in a footnote, that the petitioner's period of continuous physical presence did not end until she was served with a notice containing the date and time of her hearing. 423 F.3d 935, 937 n.3 (9th Cir. 2005) (per curiam). Because that court later afforded *Chevron* deference to the BIA's interpretation in *Camarillo*, however, *Garcia-Ramirez* no longer states the applicable law in the Ninth Circuit. *See Moscoso-Castellanos*, 803 F.3d at 1082 n.2.

removal under 8 U.S.C. § 1229b(b)(1). The petition for review is denied.

So ordered.

APPENDIX B

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A096416756 - Boston, MA

Date: Dec. 8, 2015

In re: WESCLEY FONSECA-PEREIRA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jeffrey B. Rubin, Esquire

APPLICATION: Cancellation of removal under section 240A(b)

The respondent, a native and citizen of Brazil, has appealed from the Immigration Judge's July 10, 2014, decision pretermitting his application for cancellation of removal under section 240A(b)(l) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(l). The appeal will be dismissed.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application

of a particular standard of law to those facts. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

We agree with the Immigration Judge that the respondent is ineligible for cancellation of removal, inasmuch as he has not established the requisite 10 year period of continuous physical presence. *See Matter of Camarillo,* 25 I&N Dec. 644 (BIA 2011) (holding that an alien's period of continuous physical presence for cancellation of removal is deemed to end upon the service of the Notice to Appear even if the Notice to Appear does not include the date and time of the hearing). The Notice to Appear states that the respondent was admitted into the United States on June 22,2000, and it was personally served on May 31,2006. Hence, the respondent lacks the requisite period of continuous physical presence for cancellation of removal. *See Matter of Camarillo, supra.* On appeal, the respondent argues that the stop-time rule does not apply to these proceedings because the Notice to Appear lacks the date and time of his hearing and that *Matter of Camarillo* was wrongly decided. We decline to reconsider *Matter of Camarillo,* and affirm the Immigration Judge's determination that the respondent is ineligible for cancellation of removal.

In addition, the respondent argues on appeal that these proceedings should be remanded or administratively closed to apply for deferred action. A request for a favorable exercise of prosecutorial discretion must be directed to the Department of Homeland Security, who has sole authority over such a request, and is not an appropriate basis here to remand or administratively close these proceedings.

See Matter of Avetisyan, 25 I&N Dec. 688 (BIA *2012); Matter of Yauri,* 25 I&N Dec. 103 (BIA 2009).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

Brian M. O'Leary
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW UNITED STATES IMMIGRATION COURT BOSTON, MASSACHUSETTS

File: A096-416-756 July 10, 2014

In the Matter of

WESCLEY FONSECA PEREIRA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE:	Section 237(a)91)(B) of the Immigration and Nationality Act - remained longer than permitted.
APPLICATION:	Permission to submit application for cancellation of removal as a nonpermanent resident.
ON BEHALF OF RESPONDENT:	ASHLEY M. EDENS Ruben Pomerleau, P.C. One Center Plaza; Suite 230 Boston, Massachusetts 02203
ON BEHALF OF DHS:	MARNA M. RUSHER, Assistant Chief Counsel JFK Federal Building - Room 425 Government Center Boston,

Massachusetts 02203

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE

The respondent in this case is a 33-year-old married native and citizen of Brazil. Removal proceedings were initiated against him when the Immigration Service of the Department of Homeland Security issued a Notice to Appear on May 31, 2006, charging him with being removable from the United States on the basis of the charge set forth above. (Exhibit 1).

At a hearing held before Judge D'Angelo of the Boston Immigration Court on October 31, 2007, the respondent failed to appear. Judge DAngelo issued an order of removal in absentia on that date.

On or about March 28, 2013, at a point in time after which the respondent had been arrested and detained by the Department of Homeland Security, his then attorney, Pauio J. Moura, submitted a motion to reopen the respondent's in absentia removal order. (Exhibits 3 and Group Exhibit 4).

Based upon the respondent's sworn statement that he had never received notice of his hearing and upon a review of the Record of proceedings, which reflected that the notice of the October 31, 2007, hearing had been returned to the Court, I reopened the respondent's case.

On May 8, 2013, the respondent appeared at a Master Calendar hearing with attorney Rubin from

the law firm which continues to represent the respondent. Written pleadings were submitted, which were subsequently updated to reflect that the respondent conceded the factual allegations and the charge of removability. Additionally, the respondent designated Brazil as the country for removal purposes if necessary. And further, he sought to apply for cancellation of removal as a nonpermanent resident. Additionally, he sought voluntary departure in the alternative and prosecutorial discretion. (Exhibit 5).

It was determined at the Master Calendar hearing on May 8, 2013, that the respondent at that time was not married and that he had two arrests for operating under the influence of alcohol. One of those arrests was in the year 2004 and the other in the year 2006. Based upon the fact that the respondent had been served with his Notice to Appear in hand on May 31, 2006, I determined that he was not eligible for cancellation of removal as a nonpermanent resident.

However, in the interest of humanitarian concern, I postponed his case for some 14 months in order to provide him with an opportunity to apply for prosecutorial discretion and also to see whether or not the Government might pass a new law that would protect him and somehow allow him to remain in the United States.

At a Master Calendar hearing held before me on July 9, 2014,1 was told that the respondent's application for prosecutorial discretion had been denied. Furthermore, of course, there has been no new Immigration legislation. I asked them whether

the respondent wanted to apply for voluntary departure and was advised by the attorney who was with him on that date that he still wanted to apply for cancellation of removal as a nonpermanent resident. The argument was that inasmuch as the Notice to Appear, albeit personally served on the respondent, did not have a date certain for him to come to Court, that somehow that would negate the service of the Notice to Appear insofar as it would cut off the respondent's continuous physical presence here.

I indicated that I did not believe that to be the law. But in order to err on the side of caution, I have put the case on for an Individual hearing today in order to hear the argument by the respondent's attorney. I believe the law is quite settled that DHS need not put a date certain on the Notice to Appear in order to make that document effective. I believe this to be an established law. However, the respondent's attorneys believe that that law is not appropriate or proper. Therefore, they have chosen to appeal my denial of the respondent's right to submit an application for cancellation of removal.

I acknowledge that there are backlog quotas having to do with the granting or denials of applications for cancellation of removal. However, the regulations provide that the Immigration Judge may deny an application when it appears that the respondent is simply statutorily ineligible to submit such an application. This I have determined to be the case.

All of that aside, the respondent appears to me to be a courteous and polite young man and apparently

he is now married and has two children. I do not believe that those factors provide him with a legal basis to remain in the United States, at least so far as the Immigration Court is concerned. That being the case and inasmuch as the respondent has withdrawn his application for voluntary departure, the following orders will be entered:

ORDERS

IT IS HEREBY ORDERED that the respondent's prospective application for cancellation of removal is pretermitted and denied as a matter of law.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Brazil on the basis of the charge contained in the Notice to Appear.

Please see the next page for electronic signature

LEONARD I. SHAPIRO
Immigration Judge

//s//

Immigration Judge LEONARD I. SHAPIRO

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APPENDIX D

8 U.S.C. § 1229b provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-

(A) has been physically present in the United States for a continuous period of not less than

10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that-

(i) (I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who

is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title 111—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the

date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a-

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered

under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III—A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole. ·

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A) (iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of title 22, if the relative-

(i) was, on the date on which law enforcement applied for such continued presence-

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of-

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3) (A) of title 22 is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of title 18 is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if-

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who-

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101 (a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for

any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who-

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of

deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

8 U.S.C. § 1229 provides:

Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F) (i) The requirement that the alien must immediately provide (or have provided) the

Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G) (i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying-

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the

United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101 (a)(15) of this title.